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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 251.

THE UNITED STATES EX REL. MARTIN A. KNAPP, ET AL., INTERSTATE COMMERCE COMMISSIONERS, *Plaintiff in Error,*

vs.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, *Defendant in Error.*

DEFENDANT'S BRIEF.

GEORGE C. GREENE,

Defendant's Counsel.

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DEFENDANT'S BRIEF.

Error to Circuit Court, Northern District of Ohio, to review judgment and order dismissing petition for writ of mandamus for want of jurisdiction.

STATEMENT.

The petition states that the relators acting in their capacity as members of the Interstate Commerce Commission show:

That said Commission is a body created under the "Act to Regulate Commerce," and that under the provisions of Section 12 of that Act on the 3d day of June, 1903, it prescribed the "manner and form" in which reports made pursuant to said section should be made "and the contents thereof" and directed that each carrier subject to said Act should in each year file with the Commission a report as so prescribed;

That defendant is a common carrier subject to the provisions of said Act;

That said order was served on defendant and that defendant failed and neglected to make out and return said report for the

year ending June 30, 1903, as required by the Commission, in full, in that it failed in the report made by it to set forth the data called for on page 63*a* of the form of report prescribed by the Commission; "namely, the tonnage, ton mileage, earnings and receipts per ton mile on grain, hay, cotton, live stock, dressed meats, anthracite coal, bituminous coal and lumber, carried in carload lots."

That such data or information is necessary to enable the Commission to perform and carry out the duties for which it was created.

That there is no other adequate remedy and therefor the petitioners pray for writ of mandamus, commanding that a report setting forth the omitted matters be forthwith made. (Record, pp. 2, 3, 4.)

The defendant moved that the petition be dismissed on the ground that the Circuit Court has no original jurisdiction to issue a writ of mandamus as prayed for. (Record, p. 8.)

The motion was granted and the court made a certificate conformable to Act of Congress of March 3, 1891, Chapter 517, Section 5, "that the judgment and order of dismissal of the petition of the plaintiff herein is based solely on the ground that the cause set forth in the petition, in my opinion, is not one of which the Circuit Court of the United States has any jurisdiction; and that treating the motion to dismiss petition for writ of mandamus, filed January 28, 1904, as presenting this question of jurisdiction, and acting also independently of the motion, and on the court's own motion, the suit is dismissed only for the reason above stated; that is, that there is no jurisdiction of the Circuit Court of the United States regarding the controversy."

On the 15th day of March, 1904, judgment was entered accordingly.

The plaintiff assigns as error the granting of said motion, and rendering judgment against the plaintiff. (Record, p. 12.)

In support of the judgment of the court below, and in answer to the contention of the plaintiff in that court, I respectfully submit the following:

POINTS.

I.

A Circuit Court of the United States has no jurisdiction, under the general statute defining its jurisdiction, to issue a writ of mandamus as an original proceeding, nor at all except when necessary to the exercise of its jurisdiction.

The Revised Statutes (Section 716) provide: "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The proposition above stated has been declared and reiterated in many cases in this court.

In *McIntyre vs. Wood*, 7 *Cranch*, 504, an application was made to the Circuit Court for a writ of mandamus commanding a register of the land office to issue a certificate of purchase of certain lands. The application was denied. The Court said: "The power of the Circuit Courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction."

In *Bath Co. vs. Avery*, 13 *Wall*, 244, the court said: "It must be considered as settled that the Circuit Courts of the United States are not authorized to issue writs of mandamus, unless they are necessary to the exercise of their respective jurisdictions. * * * Applying this rule to the present case, it is decisive. The relator's claim had not been brought to judgment in the Circuit Court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous."

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That there is no other adequate remedy and therefor the petitioners pray for writ of mandamus, commanding that a report setting forth the omitted matters be forthwith made. (Record, pp. 2, 3, 4.)

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In *Rosenbaum vs. Bauer*, 120 *U. S.*, 450, this court said: "The Circuit Court has no jurisdiction to award a mandamus except as ancillary to some other proceeding establishing a demand, and reducing it to a judgment, the mandamus being in the nature of process for executing the judgment."

It is deemed unnecessary to refer to the numerous other cases to the same effect.

In the Court below the only case cited by plaintiff in support of the jurisdiction was the case of *United States vs. Kendall*, 12 *Peters*, 608, but that case was brought in the Circuit Court of the District of Columbia, and this court, at page 615, said: "Unless the Circuit Court in the District of Columbia has larger powers in this respect (than the Circuit Courts of the United States) it has not authority to issue a mandamus in the present case."

II.

Jurisdiction has not been conferred upon the Circuit Court by the Act to Regulate Commerce to issue the writ of mandamus applied for in this case.

First.—Upon the argument in the court below it was contended by the counsel for the plaintiff that Section 12 of the Act to Regulate Commerce conferred such power.

In answer to such contention, I submit that that section confers no jurisdiction whatever upon the Circuit Court to issue a writ of mandamus in any case. It merely authorizes the Commission to do certain things, among which is to obtain from carriers information necessary to enable the Commission to perform the duties and carry out the objects for which it was created, and it specifies the means and method by which it may obtain such information, to wit: by requiring by subpoena the attendance and testimony of witnesses and the production of all books and papers, tariffs, contracts and documents. It also authorizes the Circuit Court to order the attendance of the carrier and of witnesses before the Commission.

The method of procurement of information by the Commission is clearly defined in Section 12 and it confers no authority upon the Commission to require or compel a carrier to expend its time, labor and money in preparing and laying before the Commission reports, statements, tables or computations upon subjects upon which the Commission may deem it necessary to have information.

Under that section it may only obtain such information by examination of witnesses and inspection of books and documents or depositions taken as is provided in that section.

The same section also provides that "upon the request of the Commission, it shall be the duty of any District Attorney of the United States to whom the Commission may apply, to institute in the *proper court* and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of this act and for the punishment of all violations thereof."

This provision, the plaintiffs contended, confers upon the Circuit Court jurisdiction to issue the writ of mandamus in this case and in all cases for the enforcement of any of the provisions of the act.

If this contention be true, then, I ask, why was it expressly provided in Section 6 of the same act, and in the new section added March 2, 1899, that *in the cases therein specified* the Circuit Courts should have jurisdiction to issue a writ of mandamus.

If the above provisions of Section 12 have the force and effect claimed by plaintiff, then such special provisions were entirely unnecessary.

Section 12 confers no jurisdiction upon any court. It merely declares the duty of district attorneys. It requires them to institute in the *proper court* all necessary proceedings for the enforcement of the act. The "necessary proceedings" intended were such proceedings as were authorized and in accordance with existing law, and they were be instituted in the *proper courts; i. e.*, courts having jurisdiction to entertain them. Counsel for plain-

tiff contented that "if the words 'necessary proceedings' do not embrace mandamus because it is not expressly named, then they do not embrace injunction or 'mandatory injunction.'"

We do not contend that the words "necessary proceedings" may not in some cases embrace mandamus, but our contention is that only in cases where jurisdiction is expressly conferred upon the Circuit Court has it jurisdiction to issue the writ, and in cases where it is not so expressly conferred, the Circuit Court is not the *proper court* in which the district attorney may institute proceedings therefor.

It is conceded that Section 12 makes it the duty of the district attorney, upon the request of the Commission, to apply to the Circuit Court for writ of mandamus under Section 6 to compel compliance with the provisions of that section at the relation of the Commissioners, because jurisdiction is expressly given to the Circuit Court to grant the writ in the case therein specified. There are many other proceedings which the district attorney may institute for the enforcement of the act in the proper courts upon the request of the Commission.

In plaintiff's brief in the court below it was said that:

> "What is the 'proper court' may be gathered from other sections of the act. In Section 6 the Courts designated for the enforcement of the provisions of that section are 'any circuit court,'" etc.

The following is the material portion of Section 6:

> "If any common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any Circuit Court of the United States * * * to compel compliance with the aforesaid provisions of this section."

Instead of Section 6 tending to show that it was intended to grant jurisdiction to the Circuit Court to enforce all the provi-

sions of the act by writ of mandamus, it shows clearly that such was not the intention, but that the jurisdiction granted was limited and only extended to cases for the enforcement of certain specified provisions of Section 6.

So also as to the other provisions of the Act, referred to by the plaintiff, which authorize certain suits and prosecutions in district and circuit courts. These specific provisions clearly show that the jurisdiction of the courts was intended to be extended to embrace only the specific cases mentioned and that it was not understood or intended that the provision in Section 12, which imposed a duty upon district attorneys, extended the jurisdiction of the Circuit Courts.

Second.—Again, it was contended that Section 16 of said Act confers jurisdiction to issue the writ, and in the plaintiff's brief it was said: "Section 16 provides that whenever 'any lawful order or requirement of the Commission' has been violated or disobeyed, it shall be lawful for the Circuit Courts of the United States 'to issue a writ of injunction or other proper process mandatory or otherwise' to prevent the continuance of such violation or disobedience."

In answer to this I contend that Section 16 has no relation or application to this case. That section authorizes the Commission, or any person interested in any order or requirement of the Commission, not founded upon a controversy requiring a trial by jury, which has not been obeyed or has been violated, to apply by "petition to the Circuit Court of the United States *sitting in equity*," and provides that the court "shall proceed to hear and determine the matter speedily as a court of equity," etc.

It also provides that "on such hearing the findings of fact in the report of the Commission shall be *prima facie* evidence of the matters therein stated."

It is clearly apparent that the orders and requirements to be enforced under the provisions of Section 16 are those which are made by the Commission after investigation, and hearing of complaints as provided in Sections 13, 14 and 15.

It is equally clear that section has no application here.

This case is not an application to the Circuit Court sitting in equity. Nor is it an application by the Commission or person interested in the order.

It is a suit at law in which the United States is party plaintiff.

III.

The Judgment and Order of the Circuit Court should be affirmed.

GEORGE C. GREENE,

Counsel for Defendant in Error.

Buffalo, February 1, 1905.

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JAMES H. McKENNEY,
Clerk.

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THE UNITED STATES EX REL. KNAPP ET AL.,
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vs.
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Defendant in Error.

No. 251.

SUPPLEMENT TO DEFENDANT'S BRIEF.

The first point now here made in the plaintiff's brief was not made or raised in the court below, and I beg leave to submit the following answer thereto. The point now made is that "under the act of March 3, 1887 (24 Stat., 552) and other similar acts passed prior thereto, a Circuit Court has jurisdiction of an original proceeding seeking relief by mandamus."

The plaintiff's counsel concedes that "this proposition is undoubtedly out of harmony with the opinions of this Court in a number of cases arising under the judiciary act of 1789 (1 Stat., 73) and the act of 1875 (18 Stat., 470)," but suggests that the public interests would be advanced if this Court would refuse to be bound by such decisions.

From the time of the decision of this Court in the year 1813, in the case of *McIntyre vs. Wood*, 7 Cranch, 504, there is an unbroken line of decisions in this Court, the Circuit Courts, and the Circuit Courts of Appeals, running down to the present time, numbering a hundred or more, in which it is held that "the power of the Circuit Courts to issue writs of *mandamus* is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction."

Among the leading cases in this Court since the law of 1875 was enacted is that of *Rosenbaum vs. Bauer*, (120 *U. S.*, 450), decided in 1887. In that case it was contended, as here, that under the act of March 3, 1875, the Circuit Courts had power to issue the writ in an original proceeding, but this Court held adversely to such contention and sustained the ruling of the Circuit Court which proceeded on these grounds:

> "1. That it had always been held by this Court that the Circuit Courts had no jurisdiction to award a *mandamus* except as ancillary to some other proceeding establishing a demand and reducing it to judgment, the *mandamus* being in the nature of process for executing the judgment.
>
> 2. That a proceeding for a *mandamus was not a suit of a civil nature*, within the meaning of any provision of the Act of March 3, 1875, *Chap.* 137, 18 *Stat. at L.* 470, and was not removable under it."

This Court said:

> "Prior to the Act of 1875, it was well settled that the Circuit Courts had no jurisdiction to issue a writ of *mandamus* in a case like the present."

The Court then, after referring to the case of *McIntyre vs. Wood*, *Bath County vs. Amy* and other cases, and quoting therefrom said:

> "The same principles have been asserted by this Court in cases arising since the Act of March 3, 1875, as in *County of Green vs. Daniel*, 102 *U. S.*, 187-195; *in U. S. vs. Schurz*, 102 *U. S.*, 378, 393; *in Davenport vs. County of Dodge*, 105 *U. S.*, 237, and in *Louisiana vs. Samuel*, 107 *U. S.*, 711, 727."

The 1st Section of the Judiciary Act of 1887, corrected by the Act of 1888, (25 Stat. at Large 433, Chap. 866), amends the 1st section of the Act of 1875, by changing the amount of the sum in dispute from $500 to $2,000, but in no respect changed the law so far as the questions here involved are concerned. So that, what was the law under the Act of 1875, as declared by this Court in *Rosenbaum vs. Bauer*, as above stated, is the law today.

Among the recent cases upon the question here involved, I beg leave to refer to the following:

In *State of Indiana vs. L. E. & W. Ry. Co.*, 85 *Fed. R. I.*, 3, decided February 23, 1898, Baker, J.

The plaintiff moved to remand the case to the State Court for the reasons:

"1. That it is not a suit of a civil nature, at law or in equity, within the meaning of the act of Congress defining the jurisdiction of the Circuit Court.

"2. That it is a proceeding, the sole object of which is to secure the issuance of a writ of mandamus against the defendant as an original writ and not as ancillary to, or in aid of any jurisdiction heretofore acquired by thisCourt."

The Court, after reviewing the history of the writ of mandamus, says:

"The construction placed upon the first clause of Section 14, of the Judidiciary Act of September, 1789, continues in force in Section 716, Revised Statutes, 1878, denies authority to the Circuit Courts of the United States to issue writs of mandamus except as ancillary to, or in aid of a pre-existing jurisdiction; and, it has been held that the present acts of Congress defining the jurisdiction of those courts have not enlarged their jurisdiction in respect to writs of mandamus.

"A proceeding for an original writ of mandamus, commenced in a State Court, *is not a suit of a civil nature* at law or in equity, within the meaning of the act of March 3, 1887, or of the act of August 13, 1888, for the re-enrolment of the former act; and therefore it is not removable under the provisions of those acts from a State Court into the Circuit Court of the United States."

The Court cites numerous cases in support of its decision, among which is of *Fuller vs. Aylesworth*, in the Circuit Court of Appeals, 6th Circuit, decided in 1896, 75 Fed. Rep, 694, in which, after reviewing authorities the, Court says, p. 699: "It follows that the writ of mandamus in the Circuit Courts is never an independent writ, as it is in many States and England, but it

is only a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the judgment of the same."

Citing *Riggs vs. Johnson County*, 6 *Wallan*, 166, 168 and other cases.

That Congress did not understand that it had conferred jurisdiction generally upon the Circuit Courts to issue writs of mandamus is shown by its enactments specially authorizing them to do so in certain specified cases.

The third section of the Act of Congress, of August 7, 1888, in relation to construction of railroad and telegraph from Marion River to the Pacific, the Interstate Commerce Commission was authorized to enforce its certain order by writ of mandamus, in the courts of the United States, in the name of the United States, at the relation of either of the Commissioners.

Again, March 2, 1889, a "new section" or supplement was added to the Act to Regulate Commerce, which provided that the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person alleging such violation by a common carrier of any of the provisions of said Act as prevents the relator from having interstate traffic moved upon rates or terms as favorable as those given to other shippers, to issue a writ or writs of mandamus against such carrier.

Section 6 (as before noted) of the Act to Regulate Commerce also authorizes the Circuit Courts to issue writ of mandamus in case there specified.

IN CONCLUSION I respectfully submit that the public interest would not be advanced by this Court's refusing to be bound by its decisions as suggested. If the "modern development of proceeding by mandamus, and the very great importance of the remedy thereby" requires that the jurisdiction of the Circuit Courts be extended, the Interstate Commerce Commission should apply to the Congress instead of to this Court for legislation in that behalf.

GEORGE C. GREENE,

Counsel for Defendant.